The Honorable Marc L. Barreca
Chapter 7
Hearing Date: September 13, 2013
Hearing Time: 9:30 a.m.
Location: Seattle—Courtroom 7106
Response Date: September 6, 2013

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In re ADAM R. GROSSMAN, Debtor.	No. 10-19817-MLB RESPONSE OF LYMAN C. OPIE TO TRUSTEE'S OBJECTION TO CLAIM NO. 16-1

Mr. Lyman C. Opie respectfully asks the Court to deny the Trustee's claim objection and allow his claim in the following amounts: (1) $185,000, plus interest, as an unsecured, nonpriority claim (with at least $135,000 treated as a community claim), and (2) $20,000 as an ordinary administrative expense under section 503(b) of the Bankruptcy Code.

First, there is no reasonable dispute that Adam Grossman borrowed money from Lyman Opie and has not paid it back. At least $135,000 in loans should be classified as a "community" claim because Mr. Grossman used the money to buy the Glennview property, which the state court classified as a community asset, and which is now part of this estate.

Second, Mr. Opie advanced $20,000 to Mr. Grossman to cover the fees and expenses of the Tsai Law Firm, who represented Mr. Grossman in his state court dissolution proceedings, and who, according to prior orders of this Court, "delivered service that has significantly benefitted the estate."

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I. FACTS

A. Loans from Mr. Opie to Mr. Grossman

Between October 6, 2009 and October 13, 2010, Lyman Opie loaned an aggregate principal amount of $205,000 to Mr. Grossman. (Opie Decl. ¶ 2.) Mr. Opie made a total of four loan disbursements to Mr. Grossman:

- $15,000 on October 6, 2009 (disbursement made by check)
- $35,000 on November 13, 2009 (disbursement made by wire transfer)
- $135,000 on May 25, 2010 (disbursement made by wire transfer)
- $20,000 on October 13, 2010 (disbursement made by check)

The first three disbursements were made to Terrington Davies Capital, which was a company owned or controlled by Mr. Grossman. The last disbursement was made, postpetition, to "Tsai Law Firm," who represented Mr. Grossman in connection with his dissolution proceeding. (Opie Decl. ¶ 3.) Mr. Grossman, the debtor in possession at the time, did not obtain prior Court approval before borrowing $20,000 postpetition.

In connection with the $15,000 loan and the $35,000 loan, Mr. Grossman executed a promissory note dated December 31, 2009. In connection with the $135,000 loan, Mr. Grossman executed a promissory note dated May 25, 2010. (The $20,000 disbursement may be accounted for under the May 25, 2010 promissory note because the note expressly provided for the possibility that additional loans of up to $30,000 might be made pursuant to its terms.) (Opie Decl. Ex. A.)

As security for his indebtedness, Mr. Grossman executed two deeds of trust for property commonly known as 20710 Glennview Drive, Cottonwood, California. The first deed is dated May 25, 2010, but was apparently never recorded. The second deed was recorded by Mr. Grossman on December 20, 2010. (Opie Decl. Ex. A.) After Mr. Opie brought that fact to the attention of the Trustee (Opie Decl. Ex. B), the Trustee and Mr. Opie stipulated that the deed of trust in favor of Mr. Opie was void (Case No. 11-1954, ECF Nos. 22, 23).

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B. Benefit to the Estate

The money that Mr. Grossman borrowed has been used to benefit the estate in several ways. First, the $135,000 that Mr. Opie advanced on May 25, 2010 was used to purchase the Glennview Drive property. (Opie Decl. ¶ 6.) The state court determined that the Glennview Drive property would be appropriately treated as a community asset. (ECF No. 258 at 6:23–25.) The Trustee was later successful in obtaining clear title to the property, and the proceeds of the property will presumably be used to pay creditors of the estate. (*See* Case No. 11-1954, ECF No. 126.)

Second, Mr. Opie's postpetition advance of $20,000 paid for the services of the Tsai Law Firm. (Opie Decl. ¶ 3.) Although there is no dispute that Mr. Grossman did not obtain authority from the Court to incur postpetition debt outside the ordinary course of business, the money was used to pay for the services of a firm whose retention was approved by the estate. (ECF No. 62.) The Court found that the "proposed family law attorney has demonstrated service that has significantly benefited the estate . . . ." (ECF No. 62.) In the course of approving that retention application, the Court also denied a motion by Jill Borodin (Mr. Grossman's ex-wife) that would have required the Tsai Law Firm to disgorge its payments. (ECF No. 63.)

The Trustee has consistently recognized that Mr. Opie made loans to Mr. Grossman. (*See, e.g.*, ECF No. 173 at 5:8–11; Case No. 11-1954, ECF No. 22 ¶ 1.) The Tsai Law Firm, however, has taken the position that it did not know that Mr. Opie was loaning the $20,000 to Mr. Grossman. (*See* ECF No. 328.) The Tsai Law Firm does not actually deny that this was in fact a loan; rather, the Tsai Law Firm takes the position that it had not seen what it regarded as sufficient evidence that this was a loan. (ECF No. 328 at 2:4–18.) Nevertheless, it was in fact intended as a loan by Mr. Opie, and that has been his consistent position throughout the case. (*See* Opie Decl. Exs. A, B.) The May 25, 2010 promissory note expressly recognized that

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Mr. Opie could, in his discretion, make additional loan disbursements under the note. (Opie Decl. Ex. A.)

The Court entered several subsequent orders suggesting that the Tsai Law Firm's work benefitted the estate. The Court approved the specific fees charged by the Tsai Law Firm during the relevant period as "reasonable and provisionally approved . . . ." (ECF No. 196.) The Trustee asked the Court to order the disgorgement of the Tsai Law Firm's fees, including "the $27,500 paid by Hendrickson/Opie to Tsai," and that motion was denied without prejudice, subject to the possibility of revisiting the issue in connection with Mr. Opie's claim. (ECF No. 331.)

II. ARGUMENT

A. The Court should allow Mr. Opie's claim for $185,000 in prepetition loans as an unsecured, nonpriority claim, with at least $135,000 treated as a community obligation.

Mr. Opie is entitled to a claim because Mr. Opie lent $185,000 to Mr. Grossman before this bankruptcy case, and $20,000 afterwards, and Mr. Grossman has not paid him back. Section 502 of the Bankruptcy Code requires the Court to allow Mr. Opie's claim unless the Trustee can show that the claim fails one or more of the tests identified in section 502(b) of the Bankruptcy Code. Mr. Opie's proof of claim is prima facie evidence of his rights, and the Trustee may not simply rely on speculation as a basis for his objection.

Mr. Opie loaned money to Mr. Grossman, as evidenced by the promissory notes executed by Mr. Grossman and the wire transfer statements and checks attached to Mr. Opie's claim. The Trustee speculates that the notes have no adequate "authentication," but the Trustee must do more than speculate to carry his burden. Mr. Opie's proof of claim, and his declaration, establish his right to repayment.

Of the $185,000, plus interest, advanced before the bankruptcy filing, at least $135,000 should be treated as a community claim. Mr. Grossman used the $135,000 advanced on May 25, 2010 to purchase the Glennview property. Although the $135,000 was disbursed to

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Terrington Davies, and not directly to Mr. Grossman, Mr. Grossman nevertheless used the funds to acquire the Glennview property in his own name. The state court later found the property was a community asset, and the Trustee successfully obtained title to the property for the benefit of all creditors. The estate would not have the Glennview property if not for Mr. Opie's loan.

B. The $20,000 loan to Mr. Grossman after the bankruptcy should be treated as an administrative expense.

Mr. Opie's $20,000 loan to Mr. Grossman after the bankruptcy should be treated as an administrative expense. Section 503 of the Bankruptcy Code states that there "shall be allowed administrative expenses . . . including . . . the actual, necessary costs and expenses of preserving the estate . . . ." Administrative expenses specifically include "compensation and reimbursement awarded under section 330(a) of this title . . . ." 11 U.S.C. § 503(b)(2).

Although a debtor in possession should seek court approval before incurred credit outside the ordinary course of business under section 364 of the Bankruptcy Code, a debtor's failure to obtain prior approval is not a bar to administrative expense treatment under section 503 of the Bankruptcy Code. In *In re Pizza of Hawaii, Inc.*, 69 B.R. 60, 61 (Bankr. D. Haw. 1986), the court gave a lender an ordinary administrative expense claim even though the debtor had borrowed money postpetition without getting prior court approval. The court denied the lender's request for superpriority treatment under section 364(c), but held that the claim for repayment "is an ordinary administrative claim, equivalent to all other administrative claimants under 11 U.S.C. § 503." Similarly, in *In re Photo Promotion Associates, Inc.*, the court held that a vendor who extended postpetition credit to a debtor in possession without prior court approval could assert the unpaid balance of its claim for processing and shipping the debtor's orders "as an administrative priority in the Chapter 11 case in accordance with 11 U.S.C. § 503(b)(1)(A) A), subject to the super priority expenses incurred in the superseded Chapter 7 case pursuant to 11 U.S.C. § 726(b) and to any offsets or quality disputes claimed by the trustee." 87 B.R. 835, 841 (Bankr. S.D.N.Y. 1988), *aff'd* 881 F.2d 6, 9–10 (2d Cir. 1989)

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(requiring creditor to return funds paid to it so that "wait in line with the other § 503(b) creditors—who cannot be paid until after Chapter 7 creditors with superior claims have been paid—for its pro rata share."). The bankruptcy court reasoned

> Colorchrome should not be further penalized for failing to comply with 11 U.S.C. § 364(c), nor should the creditors in the Chapter 11 case receive a windfall for the processing services which Colorchrome performed for the debtor during the Chapter 11 period and before the case was converted for liquidation under Chapter 7 of the Bankruptcy Code.

Id; *see also In re S. Soya Corp.*, 251 B.R. 302, 307 (Bankr. D.S.C. 2000) (loan entitled to treatment as ordinary administrative expense even though original order approving loan did not grant superpriority status under section 364). Finally, in *In re Gloria Manufacturing Corp.*, 65 B.R. 341, 348 (E.D. Va. 1985), a court even granted *superpriority* status to a postpetition lender when the debtor failed to obtain prior court approval for the loan. "The better reasoning holds that the bankruptcy court may approve the loan and grant the priority after the fact, where the loan was for an approvable purpose and benefited the business." *Id.* at 347.

Mr. Opie's $20,000 postpetition loan benefitted the estate because it paid for the services of the Tsai Law Firm. (ECF No. 43 at ¶ 13.) The Tsai Law Firm used the money to pay for "professional services rendered to Debtor in Debtor's divorce proceeding." (ECF No. 150 at 2.) Those services included "six depositions, three hearings (one in person and two by phone) and also general discovery to obtain information to use to preserve the assets of Debtor's estate during trial." (ECF No. 43 at ¶ 19.) The Court approved the estate's employment of the Tsai Law Firm in an order stating, in part, that:

> Debtor has provided a satisfactory explanation for the failure to obtain approval in advice [sic] of employment, that the proposed family law attorney has demonstrated service that has significantly benefited the estate . . . .

(ECF No. 62 at 2:4–6.) In the course of approving that retention application, the Court also denied a motion by Jill Borodin that would have required the Tsai Law Firm to disgorge its payments. (ECF No. 63.) The Court later approved the specific fees charged by the Tsai Law

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Firm during the relevant period as "reasonable and provisionally approved . . . ." (ECF No. 196.) Although the Trustee asked the Court to order the disgorgement of the Tsai Law Firm's fees, including "the $27,500 paid by Hendrickson/Opie to Tsai," that motion was denied without prejudice, subject to the possibility of revisiting the issue in connection with Mr. Opie's claim. (ECF No. 331.) In short, Mr. Opie's money paid for the services of a law firm whose retention was approved by the Court and whose fees have been provisionally approved as reasonable.

III. CONCLUSION

For the foregoing reasons, Lyman C. Opie respectfully asks the Court to deny the Trustee's claim objection and allow his claim in the following amounts: (1) $185,000, plus interest, as an unsecured, nonpriority claim (with at least $135,000 treated as a community claim), and (2) $20,000 as an ordinary administrative expense under section 503(b) of the Bankruptcy Code.

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PROOF OF SERVICE

I hereby certify that on September 6, 2013, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 6th day of September, 2013.

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